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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

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8 MIGUEL GOMEZ CERVANTES,

9 Petitioner,

10 v.

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12 NATHALIE ASHER,¹ Seattle Field Office
13 Director, United States Immigration and
Customs Enforcement, *et al.*,

14 Respondents.

15 Case No. C10-1439-RSM-JPD

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17 SUPPLEMENTAL REPORT AND
18 RECOMMENDATION

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20 I. INTRODUCTION AND SUMMARY CONCLUSION

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22 Petitioner Miguel Gomez Cervantes is a native and citizen of Mexico who is subject to a
23 final order of removal. On September 8, 2010, petitioner, proceeding through counsel, filed a
24 petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241, challenging his immigration
25 detention and seeking an order directing the United States Immigration and Customs
Enforcement (“ICE”) to release him “on any reasonable conditions that would ensure his
appearance at his continued removal proceedings.” Dkt. 1 at 4. On January 3, 2011, the

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¹ Pursuant to Federal Rule of Civil Procedure 25(d), Nathalie Asher is automatically
substituted for former Acting Field Office Director Jack Bennett as a respondent in this case.
Fed. R. Civ. P. 25(d).

undersigned Magistrate Judge issued a Report and Recommendation, recommending that
1 respondents' motion to dismiss be granted and this matter be dismissed with prejudice. Dkt. 17.
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3 On April 7, 2011, the Honorable Ricardo S. Martinez, United States District Judge, issued an
4 Order adopting the Report and Recommendation and granting respondents' motion to dismiss,
5 but granted petitioner leave to amend his habeas petition to assert a new claim of ineffective
6 assistance of counsel, noting that the undersigned Magistrate Judge did not have the opportunity
7 to review this assertion because it was raised for the first time in petitioner's objection to the
8 Report and Recommendation. Dkt. 19. On May 8, 2011, petitioner filed an amended petition for
9 writ of habeas corpus and request for release from detention, which was subsequently re-referred
10 to the undersigned Magistrate Judge for consideration. Dkt. 21.

Petitioner's amended habeas petition challenges his immigration detention and seeks an
12 order directing ICE to release him or providing a hearing before an Immigration Judge in which
13 his detention would be reviewed. Dkt. 20 at 5. Respondents subsequently filed a motion to
14 dismiss along with documentation which indicates that petitioner was released on bond on June
15 30, 2011. Dkts. 23, 24-1. Respondents argue that petitioner's claim for relief has been mooted
16 by his release and should be dismissed. *Id.* In response, petitioner asks that this Court to retain
17 jurisdiction over this matter to address the following issues:
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(1) Whether the 1994 Removal order remains a legal order should the underlying
20 criminal conviction and sentence be vacated in the proceedings now pending
21 before the Washington State Court of Appeals, (2) whether [petitioner's]
22 residence application (filed with the Department of Homeland Security in 2005)
23 has or can be decided, (3) whether these two legal cases were impacted by the
24 ineffective assistance of counsel provided by former attorneys Antonio Salazar
25 and Rembert Rhyls, who was the criminal defense attorney for Mr. Gomez in
26 1987 when the controlled substance conviction was entered, (4) whether Mr. Gomez was given an adequate opportunity, given the procedural restrictions, to present a claim that his life and freedom were threatened in Mexico on account of his membership in a particular social group, and finally whether he suffered any prejudice as a result of any of the above complaints.

SUPPLEMENTAL REPORT AND
RECOMMENDATION

Dkt. 25 at 2. Respondents reply that the Court lacks jurisdiction to consider petitioner's claims under the REAL ID Act of 2005. REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 (May 11, 2005). The Court agrees with respondents.

II. DISCUSSION

Petitioner requests that the Court retain jurisdiction of his habeas petition, maintain the temporary stay of removal, and review the order of removal. Dkt. 20 at 5. Petitioner claims without support that “[t]his court has jurisdiction to review the removal matter.” Dkt. 25 at 2. Petitioner is incorrect.

The REAL ID Act provides that “a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision” of the Act. 8 U.S.C. § 1252(a)(5); *see also* 8 U.S.C. § 1252(b)(9) (“Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States . . . shall be available only in judicial review of a final order under this section”); 8 U.S.C. § 1252(g) (“Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter”). The law specifically divests district courts of jurisdiction arising from the removal orders of aliens. *See id.* Judicial review of an administratively final order of removal is only available before the court of appeals having jurisdiction over the district where petitioner’s immigration judge holds seat. *See* 8 U.S.C. § 1252(a)(5).

1 “A request to stay an order of removal based on a pending collateral claim does not
2 escape the jurisdiction stripping provisions of the REAL ID Act.” *Mancho v. Chertoff*, 480 F.
3 Supp. 2d 160, 162 (D.D.C. 2007) (citing *Formusoh v. Gonzales*, No. 3-07-CV-0128-K, 2007 WL
4 465305 (N.D. Tex. Feb. 12, 2007) (dismissing for lack of subject matter jurisdiction habeas
5 petition of petitioner seeking stay of removal pending resolution of an I-130 petition and an I-
6 485 adjustment of status petition)); *Tale v. United States Dep’t of Homeland Sec.*, 2006 U.S.
7 Dist. LEXIS 47577, at *1 (S.D. Tex. July 13, 2006) (finding lack of jurisdiction to grant
8 petitioner preliminary and permanent injunctions barring his deportation prior to the resolution of
9 his claims pending before an immigration judge). Absent statutory or legal authority that creates
10 an exception to the REAL ID Act, this Court lacks subject matter jurisdiction to consider
11 petitioner’s habeas challenge or to grant the relief requested.

13 The Court also notes that it has no jurisdiction to look into the validity of petitioner’s plea
14 agreement or the effectiveness of his defense counsel. Rather, such claims must be raised in an
15 application for post-conviction relief filed with the appropriate federal or state court. *See Padilla*
16 *v. Kentucky*, __ U.S. __, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010) (holding that defense counsel
17 engaged in deficient performance by failing to advise the defendant of the immigration
18 consequences of his guilty plea). “The availability of post-conviction motions or other forms of
19 collateral attack does not affect the finality of the conviction for immigration purposes, unless or
20 until the conviction has been overturned pursuant to such a motion.” *Matter of Ponce De Leon*,
21 21 I&N Dec. 154, 157 (BIA 1997). Should petitioner show that his conviction has been vacated
22 pursuant to *Padilla* or some other basis, he may seek *sua sponte* reopening of his removal
23 proceedings before the BIA. *See* 8 C.F.R. § 1003.2(a).

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2 III. CONCLUSION
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5 For the foregoing reasons, the Court recommends that petitioner's amended petition for
6 writ of habeas corpus be denied, respondents' motion to dismiss be granted, and this matter be
7 dismissed with prejudice. A proposed Order accompanies this Report and Recommendation.
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10 DATED this 5th day of October, 2011.
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14 JAMES P. DONOHUE
15 United States Magistrate Judge
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